CHONG YING KHOON

v.

LEE JOO KAM & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 566 OF 1980]
1 FEBRUARY 1984

DAMAGES: *Negligence - Injuries sustained - Head injury and residual disabilities - Haematoma and lacerations - Swelling of right shoulder - Employed as technician - Medically boarded out before retirement - Quantum of damages.*

The plaintiff, a junior technician in government service was 44 years old when he was injured in an accident. The defendants admitted liability. He was medically boarded out when he was 48 years old and was unemployed at the time of the trial. The retirement age was 55 years. He sustained the following injuries: haematoma over the right eye with a laceration on it, achymosis right eye, swelling of the right shoulder and a head injury. He was comatose for more than one month. As a result of his head injury, he had a slurred speech, memory impairment, sleep difficulties and partial paralysis affecting the right side of his body. His monthly salary was RM795 per month, an overtime allowance of RM107 per month and a mileage allowance of RM113 per month. He received a gratuity which was RM4,872 less than what he would have received had he retired at 55 years. He was paid a pension of RM435 per month.

Held:

[1] The plaintiff was awarded special damages in the sum of RM31,557 for the pre-trial period, RM1,070 for loss of overtime for a period of 10 months, an agreed sum of RM624 for transport and RM4,872 for partial loss of gratuity. Interest at 3% p.a. on the said sum was awarded from the date of accident until the date of trial.

[2] The plaintiff was awarded general damages in the sum of RM80,000 for pain and suffering and loss of amenities; RM50,457.17 for pre-retirement loss of future earnings and RM25,976,87 for post-retirement loss of future earnings. Interest 6% p.a. was awarded on the said sum from the date of service of the writ until date of judgment.

[Post judgment interest at 8% p.a. was awarded on the decretal sum. Judgment to plaintiff.]

Cases referred to:

Liong Thoo v. Sawiyah & Ors. [1982] 1 MLJ 286
Kow Ah Dek v. Ratnasingam [1981] 2 MLJ 24
Tanggarasu v. Stephen Goh [1971] MLJ March issue, xxx a
Yang Salbiah & Anor. v. Jamil bin Harun [1981] 1 MLJ 292
Lim Poh Choo [1979] 2 All ER 910
Murtadza bin Mohd. Hassan v. Chong Swee Piau [1980] 1 MLJ 211
Samat Lembak v. Chong Sip Yu [1980] 1 MLJ xlvi
Lim Eng Kay v. Jaffar bin Mohamed Said [1982] CLJ (Rep) 190

Legislation referred to:

Civil Law Act 1956, s. 28A
Rules of the High Court 1980, O. 42 r. 12

Other sources referred to:
Short Encyclopaedia of Medicine for Lawyers, Levitt

For the plaintiff - Tee Eng Tuan; M/s. Murphy & Dunbar, Malacca
For the defendants - R.J. Manecksha; M/s. Lim Kean Siew & Co., Penang

JUDGMENT

Edgar Joseph Jr J:

In this running down case liability was admitted by the defendants at the commencement of the trial and so the sole question for the determination of this Court is the quantum of damages.

It was common ground that the plaintiff, a Junior Technician, Special Grade, with the Water Department of the Jabatan Kerja Raya (JKR), Pulau Pinang, aged 48, sustained serious personal injuries when on 10 August 1979, a car he was driving was in collision with a bus driven by the first defendant, a servant or agent of the second defendant. He was medically boarded out on 22 June 1980, as a direct result of his injuries and is presently unemployed.

(1) **The Award for Pain & Suffering & Loss of Amenities:** The agreed medical report of Dr. A. Letchimi, Medical Officer, General Hospital, Penang. dated 20 March 1980, disclosed that he had sustained the following injuries:

(1) Haematoma over lateral canthus right eye with a laceration on it;

(2) Ecchymosis right eye (conjuctiva + cornea - clear);

(3) Swelling right shoulder.

He was gravely ill and was comatose for more than one month. In addition, he was found to have stiffness of the right arm and right leg.

He was later examined by Dr. N. Arumugasamy, Head of the Department of Neurosurgery, General Hospital, Kuala Lumpur, on 4 August 1980, who gave a report which was part of the Agreed Bundle of Documents. This examination revealed that the plaintiff had a speech impairment and mild memory impairment but he was able to perform simple arithmetic. Sensation was intact, motor power was that of a right hemiparesis with right-sided hyperreflexia. According to the definition given in *Short Encyclopaedia of Medicine for Lawyers* by Levitt, hemiparesis means weakness or partial paralysis affecting one half of the face or one half of the body. As regards prognosis, Dr. Arumugasamy, in the final paragraph of his report, which I accept, said this:

> There is ample evidence that this patient underwent a serious head injury, as a result of which he was in a comatose condition for a variable period of a month. He recovered with residual weakness of the (R) side of the arm and leg. At present time, he is given to rather slurred speech and memory impairment, suggesting some dysfunction to his brain stem and his reticular activating system with alternate consciousness and subsequent sleep difficulties. He shows definite evidence of memory impairment with slurred speech and although able to look after himself for his daily needs, he is certainly not in a position to return to full occupancy as a Technical Assistant as in the past. Since the injury had occurred some time in August of 1979, I am inclined to think that the changes seen in him up to now are in all likelihood to remain permanent.

The plaintiff himself did not give evidence but Mr. Tee who appeared for him called three witnesses in support of the claim for quantum whose evidence I shall refer to in the course of this judgment.

I shall deal, firstly, with the claim for general damages, for pain and suffering and loss of amenities.

Mr. Tee submitted that there was a distinction between damages for pain and suffering on the one hand and loss of amenities on the other and cited *Liong Thoo v. Sawiyah & Ors.* [1982] 1 MLJ 286 in support. On this basis, Mr. Tee invited me to make separate awards for pain and suffering and loss of amenities arising from the brain injury on the one hand and that arising from the hemiparesis on the other. In such circumstances, so the argument ran, it was suggested that under the former the appropriate sum to award was RM70,000 as this was the sum awarded in a similar case, namely, *Kow Ah Dek v. Ratnasingam* [1981] 2 MLJ 24 involving a 42year-old male teacher who, unlike the plaintiff, was not medically boarded out. As regards the latter, he suggested that the appropriate sum to award was RM40,000 and in support cited *Tanggarasu v. Stephen Goh* [1971] 1 MLJ March Issue, xxx a. where RM28,000 was awarded for hemiparesis. The total sum therefore claimed for pain and suffering and loss of amenities was RM105,000. However, Mr. Tee conceded that there was an element of overlapping and, to allow for this, there should be reduction of RM5,000, thus resulting in a claim for RM100,000 only under this head.

Mr. Manecksha for the defendant submitted, in the first place, that the plaintiff's complaints referred to in the Specialist's report depended on his credibility and since he had not confirmed them by going into the witness box and submitting himself to cross-examination no credence could be given to them.

With respect, I find this submission quite untenable. It seems to me that if Mr. Manecksha was proposing to contest the truth of these complaints, he ought not to have agreed to the inclusion of the Specialist's Report in the Agreed Bundle of Documents (whose contents, incidentally, were also admitted) in which event, plaintiff would have been obliged to call the Specialist who would then have been subjected to cross-examination and, in particular, he could, and should, have been asked as to whether the complaints aforesaid were verifiable by objective tests. In the circumstances, I must assume that Dr. Arumugasamy's prognosis regarding the plaintiff's injuries was amply justified.

There was more substance in Mr. Manecksha's submission that Dr. Armugasamy had himself said at paragraph two of page two of his report that the plaintiff is able to look after himself and to attend to his daily needs including his personal hygiene. It was accordingly urged that in reality the only residual disability he had suffered was his speech impairment and hemiparesis. He argued that the case of *Yang Salbiah & Anor. v. Jamil bin Harun* [1981] 1 MLJ 292 was distinguishable because there the plaintiff was only seven years old and the injuries sustained were described as even more serious than those sustained by the plaintiff in the celebrated House of Lords case of *Lim Poh Choo* [1979] 2 All ER 910. He then suggested that a far better case was *Murtadza bin Mohd. Hassan v. Chong Swee Piau* [1980] 1 MLJ 216, 217 col. 1 paras A-C where only RM20,000 was awarded for injuries which, although different from the present case, resulted in residual disabilities which were similar.

He next cited *Samat Lembak v. Chong Sip Yu* [1980] 1 MLJ xlvi where a 63-year-old plaintiff who had sustained injuries, which he suggested were even more serious, was awarded only RM34,000.

He accordingly submitted that the complete paralysis cases were totally irrelevant and instead the last two cases mentioned afforded the best guide. On this basis, he invited me to award under this head, something between RM20,000 and RM34,000 and suggested that RM27,000 was the appropriate sum.

In my view, upon the medical evidence before me, the injuries sustained by the plaintiff in this case were similar to, but more serious than, the injuries sustained by the plaintiff in the case of *Kow Ah Dek v. Ratnasingam* (supra) where the award of general damages for pain and suffering and loss of amenities of RM70,000 "though on the high side" was upheld by the Federal Court. I am not however prepared to go all the way with Mr. Tee in his argument that the amount to be awarded under this head should be RM100,000. I consider a fairer sum to award would be RM80,000, which I hereby do.

(2) **Agreed Items of Special Damages:** Counsel on both sides have agreed that Special Damages for transport to and from hospital including family visits and other hospital expenses should be assessed at RM624 and I therefore make an award accordingly.

(3) **Special Damages claimed in respect of Car:** It was alleged that the car which the plaintiff was driving at the time of the collision was a total wreck but I do not consider that this item was sufficiently proved as the only evidence in support came from the plaintiff's wife who apparently had never seen the car after the collision and who had no personal knowledge as to what, if any, attempts had been made to salvage the car. No doubt she did say that the advice given was that the car could not be repaired. I am afraid that this part of her evidence is plainly hearsay, as the intended repairer was not called to testify. Nor do I consider the photographs of the car showing the damage done to it or the plaintiff's wife's statement that the RIMV, Penang, made a partial rebate of road tax paid, was sufficient proof of the allegation of total loss.

Similarly, the evidence as to the value of the car given in a letter dated 20 November 1981 signed by the Sales Manager of Universal Cars Sdn. Bhd. stating, generally that the market value of a Ford Escort Saloon 1098 c.c. manufactured in 1974, as at 10 August, 1979, assuming that it was in good condition and accident free, was around RM5,200, does not prove the value of this particular car. I can also make no award on the basis of repairs to the car because no evidence had been led on this issue.

In the circumstances, I regret I can award nothing in respect of this item of Special Damages.

(4) **Pre-trial Loss of Earnings:** At the date of the accident, that is to say 10 August 1979, the plaintiff was 44 years old and in receipt of a monthly salary of RM795 p.m., overtime allowance of approximately RM107 p.m. and a mileage allowance of RM113 p.m.

He was medically boarded out on 22 June 1980 when he ceased receiving a salary. But for the injuries he sustained in the accident he would have been in receipt of a maximum salary of RM870 p.m. with effect from 1 July 1980. He was paid a gratuity upon being medically boarded out and this was RM4,872 less than what he would have received had he retired at the age of 55. Apart from that, he is being paid a pension of RM435 p.m.

Upon the above facts, I make the following awards for pre-trial loss of earnings:

Loss of take-home pay at the rate of RM977 p.m. (inclusive of overtime allowance of approximately RM107 p.m.) from 1 July 1980 to date of trial, a period of about 34 months, less Income Tax at the agreed rate of 5% = RM31,577

To this sum would have to be added the loss of overtime for the first ten months following the accident, that is to say, before he was medically boarded out, namely, RM1,070

I do not however consider that the claim for mileage allowance is sustainable because such an allowance is by way of reimbursement.

(5) **Cost of Extra Care:** A substantial sum was claimed by way of cost extra care both in respect of the pre and post trial periods. I would observe that this claim was added by way of amendment of the statement of claim at the trial.

It was contended that there was a need for extra care because the plaintiff had become quick tempered, was given to scolding others for no reason, suffered from confusion of thought and had a weakness in his gait due to residual weakness of the right side involving his right arm and right leg which in turn were due to hemiparesis, all the direct result of the injury sustained. It was said that the medical evidence showed that these residual disabilities were likely to remain permanent.

Though there was no medical evidence to support the assertion that the plaintiff was in need of extra care and indeed Dr. Arumugasamy in his report had categorically stated that the plaintiff was able to look after himself and attend to his daily needs, for example going to the toilet and having a bath etc., it was nevertheless urged by Mr. Tee that the wife's evidence supported this part of the claim. She had even gone so far as to allege that by reason of his post-accident condition she was obliged to give up her part-time occupation of a seamstress thus losing an income of RM200 to RM300 p.m.

Mr. Manecksha critized this claim due to lack of medical evidence to substantiate it and referred to the Federal Court decision of *Lim Eng Kay v. Jaffar bin Mohamed Said* [1982] CLJ (Rep) 190. where Salleh Abas CJ delivering the judgment of the Court said:

> To deal with the respondent's submission first, we are of the view that this submission lacks foundation and substance because there is no evidence that the respondent's injuries are such that he requires future care, nor is there any evidence that his life expectancy is in any way affected. None of the five doctors who treated and examined him made any reference to the respondent's life expectancy.

In my view, those who make claims based on extra care - and such claims are generally substantial - must be prepared to substantiate them properly by competent medical evidence. In this case, far from calling medical evidence to substantiate the wife's assertion, the medical evidence went to contradict it, not expressly, but by necessary implication. Moreover, I see no reason why the use of a walking stick should not make the plaintiff independent.

In the circumstances, I have no alternative but to make no award under this head.

(6) **Loss of Future Earnings:** In respect of the pre-retirement period, considering that the plaintiff was 48 years old at the trial, and that the retirement age for a Government Servant in his position is 55 years, I would take a multiplier of seven years. On the basis of a multiplicant of RM1,090 per month, applying the Actuarial Tables, this would yield RM75,685.76. From this sum I would deduct one-third for the usual contingencies and for accelerated payment in a lump-sum. The resulting sum is RM50,457.17.

So far as the claim of loss of future earnings for the post-retirement period is concerned, I agree with Mr. Tee that considering the plaintiff was a technical man he would have had no difficulty in securing employment in the private sector, for example, as a Clerk of Works or he may even have embarked on his own business as a plumber since he would have the necessary capital from his gratuity to do so.

I would, in this context, respectfully refer to, and adopt, what Salleh Abas CJ said in *Kow Ah Dek v. K. Ratnasingam* [1981] 2 MLJ 24, 26 col. 2 paras C to E, namely,

> ... We however agree that employment after retirement from the public service at the age of 55 is a common occurrence which should be taken into consideration. If not injured the respondent being a teacher would likely give at least private tution to some needy pupils. The income from such occupation may be fixed to be at RM600 per month and taking into consideration various contingencies, such as illness and lack of interest in taking up post-retirement job we think it is fair that we should fix 5 years of purchase.

In the circumstances, I find nothing improbable in the suggestion made by Mr. Tee that the plaintiff might have earned RM750 p.m. for five years after retirement but for the accident. Applying the Actuarial Tables, this would yield RM38,965.30. From this sum I would again deduct one-third for the usual contingencies and for accelerated payment in a lump sum. The resulting sum is RM25,976.87 which I would award under this head.

(7) **Partial Loss of Gratuity:** According to the unchallenged evidence, the sum by way of gratuity the plaintiff would have received had he retired at the age of 55 would have been RM4,872 more than what he in fact received. I consider that the plaintiff is entitled to an award for this and I order accordingly.

(8) **Partial Loss of Pension:** Regard being had to the provisions of s. 28A of the Civil Law Act, 1956, no deduction lies in respect of loss of pension.

Conclusion:

To sum up, therefore, I make the following awards:

(1) RM80,000 being General Damages for pain and suffering and loss of amenities;

(2) RM50,457.17 being General Damages for pre-retirement loss of future earnings;

(3) RM25,976.87 being General Damages for post-retirement loss of future earnings;

(4) RM1,070 being Special Damages for loss of ten (10) months' overtime allowances from date of accident to date when plaintiff was medically boarded out;

(5) RM624 being agreed Special Damages for transport to and from hospital inclusive of visits by family;

(6) RM31,557 being Special Damages for loss of wages at the rate of RM977 (inclusive of overtime of RM107 p.m.) from 1 July 1980 to date of trial less Income Tax at the agreed rate of 5%.

(7) RM4,872 being partial loss of gratuity as a result of being medically boarded out.

The total sum is therefore RM194,557.04 which I would round off at RM194,500.

I must now cast a retrospective glance at this figure. At first sight it might appear large but it should be recognized that it must provide for the plaintiff for the rest of his life and his life expectancy may go beyond the normal 68 years. No evidence was led to show that he had suffered any loss of expectation of life. Moreover, the value of money may be eroded by future inflation. In arriving at the awards aforesaid I have applied the principles to be distilled from the recent decisions of our Courts.

I would also award interest at 3% per annum on Special Damages from date of accident to date of trial and at 6% on General Damages for pain and suffering and loss of amenities from date of service of writ: (see *Murtadza bin Mohamed Hasssan v. Chong Swee Piau*

[1980] 1 MLJ 211, 218 col. 2 para H. It goes without saying that the judgement debt will attract interest at the rate of 8% per annum from date of judgment until satisfaction by virtue of the provisions of O. 42 r. 12 of the Rules of the High Court 1980.

The defendants will also pay the plaintiff's costs of this action.

Also found at [1988] 1 CLJ 795